UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 1

NEW ENGLAND HEALTH CARE EMPLOYEES UNION 1199 and NSL COUNTRY GARDENS, LLC	Case Nos.	01-CA-223025 01-CA-223397 01-CA-223565 01-CA-224038 01-CA-224658 01-CA-229386 01-CA-230066 01-CA-231797 01-CA-231850

NSL COUNTRY GARDENS LLC'S POST-HEARING BRIEF

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I. INTRODUCTION

Country Gardens Health and Rehabilitation Center is a skilled nursing facility located in Swansea, MA. In 2016, NSL Country Gardens, LLC acquired that facility. At that time, New England Health Care Employees Union District 1199, SEIU represented two small bargaining units of employees, primarily nursing staff (RNs, LPNs and CNAs), and had been the building for decades. Although the bargaining units were small – only about 50 employees cumulatively – the Union had designated 6 of those employees to act as Union delegates. Despite such a large number of delegates to represent them, employees got little from the Union beyond a dues deduction from their hard-earned paychecks. The delegates were an exclusive clique of long-term employees, and as far as non-delegates could see, their primary duty as was to spend as much time as possible either in the resident care areas not working, or conspicuously absent from the floor entirely. Compounding this lack of representation in the building, the Union Organizer assigned to the facility spent little time there.

The Union's failure to represent employees, combined with the delegates' entitled attitudes and outright hostility towards the employees they supposedly represented, led to the Union's loss of majority support in 2018. In June 2018, one of the CNA's who was tired of having money deducted from her paycheck each week by a Union that did nothing to earn those payments decided to take action. She did an internet search for "how to get rid of a union," leading her to seek guidance and assistance from the NLRB's Region 1 office in Boston, MA. Through what she learned on the internet and from the Field Attorneys and Board Agents in that office, the employee created a decertification petition and obtained signatures from a majority of the bargaining unit employees affirming their desire to cease being represented by the Union.

On July 5, 2018, the employee filed that petition with the NLRB and served it on the Employer. The following day, based on the Union's loss of majority support, the Employer withdrew recognition from the Union. At that time, the 90 to 120-day window prior to the October 31, 2018 expiration of the CBAs was in effect, so the Employer lawfully withdrew recognition rather than going through an unnecessary election process.

At this point the Union, suddenly shaken from its years-long slumber and virtual absence, began a targeted and methodical campaign of harassment and threats against the former bargaining unit employees, desperately seeking to coerce them into allowing the Union to represent them again and restart the spigot of dues payments. The Union also filed a flurry of unfair labor practice charges, alleging a wide range of purported improper conduct in hopes of undoing the damage its consistent failure to represent the employees had caused. In doing so, the Union attempted to paint the facility's management as evil conspirators who plotted to unlawfully force the Union out of the building, going as far as alleging that even the employees' interest in the decertification petition was something management caused on its own. Indeed, virtually every action management took, including terminating staff for failures to follow "reportable incident" protocols related to potential incidents of abuse became another event to reframe as a violation of the Act. Incredibly, these included allegations that implementing wage increases **explicitly authorized by the CBA** somehow constituted unlawful conduct.

Despite the allegations asserted by the Union and pursued by the General Counsel, the Employer did not commit any unlawful acts in its dealings with the Union and accordingly, the withdrawal of recognition must stand and all of the relief requested must be denied as a matter of law.

II. FACTUAL BACKGROUND

A. Country Gardens Health and Rehabilitation Center

1. The Facility and Its Management

NSL operates Country Gardens Health and Rehabilitation Center, a skilled nursing facility located in Swansea, Massachusetts. Country Gardens is a residential care facility that provides skilled nursing services, rehabilitation, long-term, respite and palliative care. The facility is divided into two units, which are generally referred to as the East Wing and West Wing. Each unit is comprised of resident (patient) rooms and various common areas, including a dining room, a day room and an activity room on each unit. Each unit also contains a nurses' station, located in the open area between the day room and dining room areas. (Jt. Exh. 30).

From February 2017 until October 2018, Jamie Belezarian was the Administrator of the facility and had an office in the building. She reported to Joseph Veno, the Company's Regional Vice President. Veno did not have a permanent office in the building, but visited on a regular basis as part of his normal job duties.

The nursing staff at Country Gardens were directly supervised by various management staff who were stationed in the facility, including a Director of Nursing (DON), an Assistant Director of Nursing (ADON) and a Minimum Data Set (MDS) Coordinator.

2. Employees Formerly Covered by Collective Bargaining Agreements

Some of the employees at the facility were formerly represented for purposes of collective bargaining by New England Health Care Employees Union District 1199, SEIU (the "Union"). During the time period relevant to this dispute, there were two certified bargaining units at the facility, each subject to a separate collective bargaining agreement ("CBA"):

> **Unit A**: All full-time and regular part-time Registered Nurses; excluding all other Employees, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, other Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.
>
> **Unit B**: All full-time and regular part-time Licensed Practical Nurses, Nurses' Aides, Orderlies, Technical Employees, Kitchen Employees, Housekeeping Employees, Maintenance Employees, and Laundry Employees; excluding all other Employees, Registered Nurses, Director of Nursing, Supervisor of Nursing, Assistant Supervisors of Nursing, Food Service Supervisor, First Cook, Maintenance Supervisor, Housekeeping/Laundry Working Supervisor, Social Worker, Professional Employees, Managerial Employees, Temporary Employees, Guards and Supervisors as defined in the Act.

GC Exh. 50, ¶ 19). As of July 2018, there were 6 employees in Unit A and 46 employees in Unit B. The most recent CBAs governing these employees' employment became effective on November 1, 2016 and would have expired on October 31, 2018 if they had run their full terms. (Jt. Exhs. 1-2).

During the terms of the 2016 CBAs, even though there were only 52 bargaining unit employees, six of those employees were designated as Union delegates, including Donna Brown (CNA), Phyllis Gomes (LPN), Karen Hirst (LPN), Dawn Nunes (RN), Viola Rego (CNA) and Stephanie Sullivan (CNA). The employees outside representative from the Union was an Organizer named Linda Teoli.

B. Contract Language Regarding CNA Wage Rates

Article 5.1 of the CBA applicable to the Certified Nursing Assistants (CNAs) provided that the minimum start rate for CNAs was $11.50 per hour. (Jt. Exh. 1, Art. 5.1). However, that Article also gave NSL discretion to hire CNAs at higher hourly rates:

> The Employer may hire above the minimum start rate. If the Employer hires an employee above the minimum start rate, based on their qualifications and years of experience, current employees in the classification with the same or greater experience with the Employer shall be paid no less than the new employee. The

Employer will notify the Union prior to giving any mid-term wage increases.

(*Id.*). Pursuant to this language, if the reason NSL hired a CNA above the start rate was because of her "qualifications and years of experience," current CNAs with equivalent experience had to be increased to at least the same rate as the new CNA, and the Union was entitled to prior notice that the existing CNA was receiving this mandatory mid-term increase. However, if a CNA was hired above the start rate for some reason *other than* her qualifications and years of experience, there is no requirement in Article 5.1 (or anywhere else in the CBA) that existing CNAs would also receive increases and/or that the Union receive advance notice of any such increases that NSL might voluntarily implement.

C. Country Gardens' Persistent and Critical Staffing Shortages

1. Country Gardens' Hiring Efforts and Procedures for Filling Open Shifts

Belezarian worked at Country Gardens from November 2016 through October 2018. She was originally hired as the DON, and three months later in February 2017 became the Administrator. (Belezarian 2038-39). Throughout Belezarian's tenure, the facility had a chronic shortage of nursing staff. (Belezarian 2039:1-6, 2049:13-15). (Belezarian 2045:7-12). For example, when Belezarian was hired there were over a dozen open nursing positions, with only one LPN employed by the facility and zero RNs employed on the 3:00 pm to 11:00 pm shift. (Belezarian 2039). This was extremely problematic, as state law requires the facility meet certain minimum staffing levels to provide adequate care. As a result, the facility was forced to rely heavily on nursing agencies to provide temporary staff to cover the many open shifts and vacant positions. (*Id.*). In order to improve staffing, Belezarian pursued several different avenues to attract more non-agency staff. These efforts included holding job fairs, postings ads to online job boards, and establishing a higher hourly rate for per diem (daily) CNAs.

While the facility did manage to attract some additional staff, there were still severe shortages as of Spring 2017. At that time, the facility had a system in place for obtaining coverage for unexpected open shifts and callouts (i.e. employees calling in sick, no shows, etc.). The CBA did not impose any requirements with regard to how management would find coverage for open shifts, so pursuant to the Management Rights clause (Article 16), it was up to management's discretion to make this determination.[1] In order to fill unexpected openings, management generally took several steps in the following order, beginning two hours[2] before the open shift:

- Call employees not currently working: the DON, Staffing Coordinator, the Infection Control Nurse and (sometimes) the Administrator would split up the roster of nursing employees and call nurses who were not already in the facility working a shift. Two of the Union delegates, Stephanie Sullivan and Donna Brown, often assisted in making these calls.

- Simultaneous with the employee phone calls, another member of the management team (or Union delegates Sullivan and Brown) would walk the units and ask staff who were already at work if they were willing to stay after their shift to work another one.

- Approximately one hour before the open shift, the management team would regroup to see if anyone had found coverage.

- If not, an employee who was already at work would be mandated (required) to stay and work another shift so that the facility maintained at least the minimum legally required staffing levels. Such mandating would be determined by seniority, with the least senior person being mandated first.

(Belezarian 2043-45, 2049). Importantly, the CBA did not require that management consider seniority when filling unexpected callouts, regardless of whether they were filled by volunteers or

[1] The Management Rights clause provided that "All rights, functions and prerogatives of the Employer are retained by, and remain exclusively in, the Employer" absent specific and explicit language modifying any such rights. Those management rights included the determination of operational and other policies, the determination of methods and procedures." (Jt. Exh. 1).

[2] The CBA provided that employees could call-out up to two hours before their scheduled shift without being disciplined, so

by mandating employees to stay. (Jt. Exh. 1; Belezarian 2043, 2046). This procedure for filling open shifts did not change throughout Belezarian's tenure as Administrator. (Belezarian 2047-48).

2. Country Gardens Experiences Critical Weekend Staffing Shortages Beginning in April 2017

Despite NSL's continued efforts to hire more staff and keep shifts filled, staffing issues reached a tipping point in Spring 2017. In mid-April of that year (on a holiday weekend), multiple CNAs simultaneously either resigned or were "no call-no shows" who never showed up for work. (Belezarian 2049:16-2050:6). Because of the immediate and excessive need, Belezarian contacted a staffing agency seeking temporary nursing help. However, the agency did not have workers available. (Belezarian 2050:2-17). Belezarian, along with Union delegates Sullivan and Brown, then began contacting NSL employees to see if any were willing to work the open shifts, but those employees all declined. (Belezarian 2049:4-6). At that time, Union delegate Sullivan and CNA Victoria Palmer suggested that Belezarian offer incentives to employees to pick up open shifts. (Belezarian 2050:23-2051:8). Belezarian took their suggestion and offered nurses 1.5 times the standard hourly rate to pick up the open shifts. This last resort effort sufficed to bring staffing for the holiday weekend up to the legally mandated levels and insured that residents would receive proper care.

However, NSL's staffing issues persisted. From Easter of 2017 through May 2018, NSL had open shifts almost every weekend and on most Friday evenings. (Belezarian 2052). The facility attempted to use staffing agencies to fill vacant positions and shifts, but the shortages were simply too severe. (Belezarian 2039:17-2040:2). It also continued to follow its normal procedures for filling callouts (calling employees at home, seeking volunteers, mandating employees to stay for additional shifts), but these efforts frequently failed. (Belezarian 2054). As a result, NSL

continued to offer incentives in the form of premium (1.5 times) hourly pay when it was necessary to do so. (Belezarian 2054:7-21). In approximately July 2017, the facility also began offering employees additional paid time off as an incentive to cover a shift in the occasional instances where the premium pay incentive failed to secure staffing for that shift. (Belezarian 2054).

The ability to offer these incentives was critical; if the facility could not find an individual to voluntarily cover a shift (with an incentive or otherwise), it was required to mandate an already-working employee to work a double shift to prevent the facility from violating state regulations regarding minimum staffing. (Belezarian 2045:7-12). However, even such mandating was not an option if staff had already worked too many hours in a particular day or week.

Importantly, all of the Union delegates were aware of, and never objected to, these last resort incentives to fill open shifts. (Belezarian 2055:25-2056:9). In fact, at least four Union delegates (Gomes, Sullivan, Nunes, and Hirst) voluntarily picked up shifts and received these incentives themselves. (Belezarian 2055:12-25, 2056:1-13). Moreover, the delegates often assisted management in finding coverage, and when doing so those delegates regularly offered the incentives to other employees. (Belezarian 2056:14-22). Furthermore, management never told the individuals who received an incentive for working an open shift that it was a secret or that they were not allowed to discuss it. (Belezarian 2052). To the contrary, it was common knowledge among all the staff and the Union that the practice was occurring. (Belezarian 2055:12-2056:22).

D. Belezarian Meets with the Union Delegates in May 2018 to Discuss Staffing Issues and Compensation

In late 2017, NSL established a rate of $14.00 per hour for the non-union per diem CNAs. (Belezarian 2057:14-2058:10). These per diem positions were not bargaining unit positions and accordingly, were not subject to the CBA. Periodically, NSL hired one of the per diem CNAs to fill an opening for a regular full-time CNA position. The per diem CNAs could also become

regular full-time or part-time (bargaining unit) CNAs by virtue of the number of hours they worked. Pursuant to Article 1.2 of the CBA, if a per diem CNA worked more than 184 hours during the previous three months and continued to be normally scheduled, she would be classified as a regular part-time or full-time CNA. (Jt. Exh. 1).

When a former per diem CNA became a bargaining unit CNA, she would maintain her $14.00 hourly rate as her start rate in the new position. (Belezarian 2059:1-9). Importantly, when NSL established the $14.00 per diem rate, Belezarian believed all of the existing bargaining unit CNAs already received at least that same rate. (Belezarian 2060:14-18, 2062:9-13). However, in May 2018 while conducting a financial review, Belezarian realized that three CNAs – Hyacinth Campbell, Stacy Hayes, and Sherry Martin – were being paid less than all the others. (Belezarian 2060:19-23, 2061:18-2062:2). Upon learning this information, Belezarian immediately sought and received permission to raise those three CNA's rates to $14.00 as well. (Belezarian 2062:3-8).

Also in May 2018, Belezarian and Heather Perry, Director of Nursing, held a meeting with four of the Union delegates – Brown, Nunes, Sullivan, and Gomes – to discuss various workplace issues. (Belezarian 2062:17-2063:6). Linda Teoli, the Union organizer, did not attend because she was out on a leave of absence. (Belezarian 2065:10-20). However, prior to beginning her leave, Teoli had requested that if NSL wanted to communicate anything to the Union during her absence, **it should do so through the delegates**. (*Id.*). Belezarian convened this meeting pursuant to Teoli's request.

At the meeting, the parties discussed ongoing staffing issues and the difficulty in hiring CNAs at the minimum contractual rate of $11.50 per hour. (Belezarian 2063:9-13). Belezarian advised the delegates that pursuant to Article 5.1 of the CBA, the Company was raising the CNA start rate to $14.00. Belezarian had brought a copy of the CBA with her to the meeting, and at that

point she took it out and specifically referenced Article 5.1. (Belezarian 2063).

Notably, all the Union delegates in attendance in the meeting affirmed their agreement that the increases should occur. Gomes said she thought it was a good idea to raise the rates and noted how hard it was to "get good help in here," and Sullivan agreed that the increases were a good idea. (Belezarian 2064; Perry 1715:22-1717:1). None of the delegates objected to the increases in any way – they did not assert that the increases would violate the CBA, or that they believed NSL needed to negotiate the issue or get advance permission from Teoli prior to implementing the increases. (Belezarian 2064:11-24, 2065:3-9, 2065:21-25; Perry 1715:22-1717:1).

E. Linda Teoli Objects to the CNA Rate Increases a During a June 12, 2018 Grievance Meeting

On June 12, 2018, the parties met to discuss the Union's grievance over the recent termination of a CNA named Tanisha Miller. (Belezarian 2066-67; Veno 2374:6-2375:13). By this time, Teoli had returned from her leave of absence, so she attended the meeting. Also in attendance were Miller, four Union delegates (Brown, Gomez, Nunes and Hirst), Director of Nursing Heather Perry, Regional Vice President Joe Veno, and Belezarian. (Belezarian 2066:11-14; Perry 1717:19-1718:18; Veno 2373:10-2374:5).

The meeting began with a discussion of the grievance, which Miller was present for. Miller then left the meeting, and Teoli said she wanted to discuss the CNA start rate increase. When Belezarian told Teoli that the rate had already been increased, Teoli became extremely angry and unprofessional. Teoli lashed out at Belezarian yelling "I'm sorry, are you fucking kidding me? You're a fucking asshole" (Belezarian 2067:12-21; Veno 2376:4-2378:4). Confused, Belezarian asked Teoli why she was upset that NSL gave the employees a raise. Teoli responded that she did not "give a fuck" about the employees and that NSL would "need to lower their wages until we negotiate this." (Belezarian 2068:4-10; Veno 2386:23-2387:25). At that point the room got quiet,

Belezarian was very upset and embarrassed by Teoli's outburst, and the delegates also appeared very upset. (Belezarian 2067-2068; Perry 1718:24-1719:4; Veno 2467:4-17). Belezarian looked around the room at all the delegates and stated to them "you guys all knew this, so…" but none of them responded or admitted being aware of the increases, and instead just sat in silence. (Belezarian 2068).

Belezarian stated that she was going to her office to get a printout of the CNA wage rates and then the discussion would continue. (Belezarian 2068:11-15). Then Belezarian and Veno both left the room together, but Veno never returned because he went to get on a conference call. A few minutes later, Belezarian returned to the meeting with a document listing the wage rates for CNAs and gave it to Teoli. (Belezarian 2069:9-15). Teoli reviewed the document and became angry about a whole new issue – that three of the long-term CNAs were only paid slightly more than the $14.00 per hour rate that new CNAs were being paid. (Belezarian 2069:13-2070:11). Teoli complained that there was not a large enough gap between the hourly rates of the long-term employees and the new employees. (*Id.*). Teoli also threatened that she was going to file multiple unfair labor practice charges and that she would try to cause the facility to lose its license. (Belezarian 2070-71). At this point, the parties agreed to end the meeting and reconvene in approximately two weeks to continue the discussion.

In an effort to defuse the volatile situation that had developed, Belezarian extended an olive branch to Teoli, sending her texts apologizing for any misunderstanding between the parties related to the increases and asking Teoli to give her a chance to "make everything right." Belezarian also reiterated that the delegates had all been made aware of the increases. Notably, this was exactly how Teoli had requested Belezarian communicate with the Union during Teoli's leave of absence – through the delegates.

F. The Union Attempts to Circumvent Section 5.1 of the CBA

On June 18, 2018, Teoli emailed Belezarian a proposed Memorandum of Understanding (MOU) and demanded that it be accepted and signed by NSL within two days. (GC Exh. 6). The next day, Teoli emailed Belezarian again, reiterating her demand that the Company execute the MOA. (GC Exh. 8). However, NSL had increased the start rates pursuant to Section 5.1 of the CBA, which explicitly provided that "[t]he Employer may hire above the minimum start rate." Accordingly, NSL rejected Teoli's demand that it enter into a MOU related to the increases. (Belezarian 2071-72).

G. Employees Approach Belezarian with Concerns About the Union Lowering Wages

In the days following the June 12 meeting, several CNAs approached Belezarian and Katherine Minyo, Assistant Director of Nursing, with concerns about the Union seeking to lower their wage rates. They expressed several reasons for these concerns. First, they were well aware that Teoli had vehemently objected to NSL increasing the rate of CNAs to $14.00, and that Teoli had stated she did so because she wanted the Union to get credit for earning employees the increases (even though it had not). (Teoli 653:9-654:6). Second, some of the delegates had now started telling CNAs their rates would be reduced, underscoring for the CNAs that there concerns were well justified. For example, Nicole Talbot came to Minyo and Belezarian in tears and stated that Sullivan told her not to get comfortable at her $14.00 rate because "her wages were going to be dropped" and that NSL had "illegally raised them." (Belezarian 2074; Minyo 310:19-311:13**)**. Nickole Gaeta also came to Belezarian and reported that Sullivan was out on the unit telling Gaeta and other CNAs that their wages "were going to be dropped." (Belezarian 2074).

A few days later, Gaeta, Talbot, Cabral and Palmer met with Belezarian in her office and reiterated their concerns. MDS Coordinator Mallory O'Kane was also present during this meeting.

(Belezarian 2074-2076). The four CNAs pressed Belezarian on how they could prevent their wages from being reduced. Belezarian told them that, as she saw it, there were three options available to them: (1) wait until the negotiations for a new CBA occurred in October; (2) quit their current positions, work through an agency and request that the agency place them at Country Gardens; or (3) pass a petition around to vote the Union out. (Belezarian 2075-76). Belezarian did not offer any opinion as to whether any one of the three options was better or worse than the others, nor did she offer her personal opinion as to which of those options the employees should pursue. (Belezarian 2077).

Talbot then asked "how do we get rid of the Union?" Belezarian laughed and responded "you're not going to be able to do that, they've been here since the [19]70's, I think since the year I was born." (Belezarian 2076:3-4). Belezarian's comment was based upon not only her professional experiences, but also on her personal knowledge – her father is a union organizer. (Veno 2448). Gaeta then responded enthusiastically, opining that they should all work through an agency because they would make more money (as agencies generally paid very well). Belezarian noted that the facility was using a staffing agency called IntelyCare at the time, and thought that might be an agency where they could "potentially still do some of their hours at Country Gardens" if the agency assigned them there. (Belezarian 2075-76). However, Belezarian noted that they could not work for an agency and Country Gardens at the same time, as this was a potential conflict of interest. (Belezarian 2040-41, 2076).

In response, all four employees stated they wished to resign their positions and work through an agency instead. At that time, they each gave Belezarian a resignation letter, then the meeting concluded. However, almost immediately after the meeting ended, Belezarian and O'Kane discussed what had just occurred and felt that the notion of working for an agency may

not be feasible. At the time Belezarian mentioned the potential of working through an agency as one of the employees' options, she had not given that idea much thought. It was a "spur of the moment" idea that she had in response to the concerns being raised by the distressed employees. But after the meeting, it occurred to her that she did not even know if IntelyCare had any positions available, let alone full-time positions for all four CNAs. (Belezarian 2079-80). Upon reflection, Belezarian "just thought it was a – I knew it was a bad idea." (Belezarian 2079:13-19).

For all those reasons, Belezarian decided she should not accept the CNAs resignation letters, so she "ripped them up and threw them in the trash." (Belezarian 2079). Belezarian subsequently told the four CNAs that she had done so, explaining to each one that she realized it was a bad idea because they did not have guaranteed jobs elsewhere. (Belezarian 2079-80). All four CNAs decided to continue working at the facility, and there were no further discussions of the issue. (Belezarian 2079-80).

H. Non-Management Employee April Birch Obtains Signatures From a Majority of the Bargaining Unit Employees Seeking Decertification

In or around the summer of 2018, many NSL employees were extremely dissatisfied with the Union. (Belezarian 2084:17-2085:3). One of the employees who had numerous complaints regarding the Union was April Birch, a LPN who began working at the facility in June 2017. (Birch 1341:22-23). Birch, who had never worked in a unionized facility before, was very sensitive to the fact that dues were deducted from her paychecks. This led Birch to question Union delegates as to what, if anything, she received for her money. Birch also questioned delegates regarding their frequent and lengthy disappearances from the patient care areas for "union meetings," and requested information regarding what was being discussed in these meetings and how it impacted her.

In response, Birch received vague and unsatisfying explanations of how she was purportedly benefitting from being in a union. Worse, she was also met with outright hostility for having the gall to even ask delegates such questions. It quickly became clear to Birch that the Union delegates were nothing more than a small clique of self-serving employees whose hostile attitudes and constant gossiping served only to create animosity in the workplace. (Birch 1352:21-1355:25). Unwilling to accept such treatment and lack of representation from a group that she was paying to represent her, Birch began researching how to stop being part of the Union.

Birch started by simply performing a Google search for "how to get rid of a union." (Birch 1373:9-12). This led her to various websites, including one that laid out the decertification process with step-by-step instructions on how to start a petition and what to do with it. The site also offered template forms and petitions. (Resp. Exh. 25(a); Birch 1373:13-1374:3, 1375:1-1376:7). Based on her research, Birch thought that decertification "seemed like a very easy process" because "all you ha[d] to do was get 30 percent or more of the employee that were in the Union to sign [a decertification petition]" and then there would be a vote at the facility. (Birch 1373). Once Birch learned of the 30 percent threshold, she "put the word out" to see if she could meet that threshold. (Birch 1373-74). Specifically, Birch asked approximately 15 CNAs "how they felt, if they wanted to remain in the Union and if they were happy." Every one of those CNAs responded that they were unhappy with the Union and did not want to remain in the Union. (Birch 1374).

Birch's research also led her to the NLRB, and she began communicating by phone and email with the NLRB's Region 1 office in Boston for advice regarding the decertification process. (Birch 1380:15-1382:7, 1381-1382). During Birch's first call to the NLRB, she asked whether she could "get in trouble at work for doing a petition to remove the Union." The NLRB representative she spoke with (a male whose name she did not write down) told Birch that she could not lose her

job for seeking decertification, but also advised her that she should not collect signatures during work time. (Birch 1380:22-1381:21, 1387:11-13, 1395:2-15). Based on her research and the NLRB's advice, Birch began collecting signatures on a petition disclaiming interest in continued representation. The decertification petition that Birch created states, in relevant part:

Petition for decertification (RD) – Removal of Representative

> The undersigned employees … ***do not want to be represented*** by [the Union]. … Should the undersigned employees make up 50% or more of the bargaining unit … the undersigned employees hereby request that [the employer] ***withdraw recognition from this union immediately***, as it does not enjoy the support of a majority of employees in the bargaining unit.

(Jt. Exh. 29 [emphasis added]). The top of each also page stated that "[t]he undersigned employees of Country Gardens ***do not wish to be represented by NE Healthcare Employees Union SEIU AFL-CIO***." (*Id.* [emphasis added]).[3]

Importantly, no one from NSL's management team ever asked Birch to begin the decertification effort, nor did they assist her in the petition process in any way. (Birch 1518:9-19; Sherman 289:11-22, 292:14-17; Talbot 1911:24-25, 1912:12-17, 1912:24-1913:1; Minyo 313:4-20, 330:15-22, 356:10-15; Gaeta 112:16-25, 132:19-22; Nault 1987:2-11; 1994:14-23; O'Kane 1658:16-20; Sousa 1596:20-1597:8; Cabral 1931:25-1932:20). In fact, Birch actively sought to prevent management from learning of her efforts to gather signatures, as she did not know management's position regarding the Union. (Birch 1384:6-9). Specifically, Birch was concerned

[3] The Board contends that Birch told employees that the Union wanted to decrease employee wages. Birch refutes this contention. (Birch 1478:7-11). However, even if Birch had made such statements, they would have been accurate and lawful. The Union objected to NSL raising the CNA starting wage to $14.00 per hour even though the collective bargaining agreement authorized NSL to do so. (*See* Birch 1363:6-11 [A: [Sullivan] said that the rate needed to be brought back down until there was contract negotiations.]; Birch 1475:3-4 [A: … [S]he said the wages had to be brought back down, before we entered negotiations]). Moreover, even if Birch had made *inaccurate* statements about wages, they would not be unlawful or negate the petition, as Birch was a bargaining unit employee not a member of management.

that she may *get in trouble* with management for starting the petition. Birch "didn't know how management felt about the Union," but she thought management "probably liked the Union" because "[during] the last negotiation they only had to give everyone ten cents as a raise." (Birch 1384:6-9). For all those reasons, Birch did not even speak to management about decertification until after she had filed the petition with the NLRB. (Birch 1401:21-1402:22).

Birch obtained nearly all the signatures on the petition supporting decertification between Friday, June 22 and Monday, June 24, 2018. (*See* Jt. Exh. 29). Birch gathered signatures at her home and during work breaks; she did not collect them on work time. (*See, e.g.*, Talbot 1892:11-13 [Q: When did that [conversation with Birch regarding the petition] happen…? A: At the facility before I clocked in for my shift.]; Caseiro 1797:18-1799:13; Picard 1844:11-23; Talbot 1892:17-1893:4; Cabral 1930:4-). Once word about the petition got out amongst employees, several approached Birch during their breaks or when she was outside smoking so they could sign it. (Birch 1386:16-1388:23, 1391:16-1392:12, 1518:6-8). Importantly, numerous signatories testified that:

- **Neither Belezarian nor other members of management involved themselves in the decertification effort by, for example, asking employees if they signed or what their opinions were regarding the petition**.[4] (*See, e.g.*, Sherman 292:14-16 [Q: [[D]o you know whether management … assisted April Birch in circulating her petition? A: No.]; Talbot 1911:24-25 [Q: Did Jamie Belezarian ever ask you if you had signed it? A: No. Q: Did anyone from management ever ask [about the petition]? A: No.]; Talbot 1912:17 [Q: … After you signed the petition … have you had any conversations with [] Belezarian about this petition? A: No. Q: Or anybody from management? A: No.]; Talbot 1912:24-1913:1 [Q: Did anyone ever offer you anything or promise you anything in exchange for

[4] The Board contends that Belezarian told some employees that NSL would increase wages if they decertified the Union. Multiple employees, including one of the Board's own witnesses, refuted that allegation. (Gaeta 112:16-25 [Q. Okay. Were those based on, in part, by the comments Ms. Belezarian made at the meeting about the different options to get a wage increase? A. No… Q. Were you promised any benefit if you filled out the document? A. I wouldn't say we were promised any benefits if we filled out the document[.]]; Sousa 1596:20-1597:8).

signing April's petition? A: No. Q: Did anybody ever tell you that something bad might happen if you didn't sign it? A: No.]; Sherman 289:11-22 [Q: … [Y]ou volunteered that [you signed the petition] on your own free will and accord, that information on your own free will, correct? A: Yes. Q: No one … asked for that information, correct? A: No. Q: [N]o one from management asked you if you signed a petition, correct? A: No.]; Minyo 313:4-7 [Q: … [D]id you ever witness Jamie Belezarian speaking with April Birch about the union? A: No. …Sometimes [Birch] would complain about [the Union]…Jamie said that there's really nothing that she could do[.]"]; Nault 1987, 1993-94).

- **They clearly understood the purpose of the petition was to decertify the union**. (Talbot 1894:10-16 [Q: …[Y]ou had decided you didn't want to be in the union any more, right? A: Yes.]; Nault 1989:4-7 [Q: …[S]ince you signed this petition, I'm assuming that means…you didn't want to be represented by the union anymore, right? A: Yes.]; Palmer 188:15-17 [Q: … [W]hen April approached you, what was your understanding of what you were signing? A: A petition to get the union out.]; Sherman 256:4-6 [Q: [] [W]hat was your understanding of what you were signing when you signed this document? A: To remove the union from the building.]).

Moreover, no employees ever alleged to Belezarian or anyone else on the management team that Birch gathered signatures during work time. (Belezarian 2194-95).

In total, Birch collected 32 signatures, well over 50 percent of all bargaining unit employees. (Jt. Exh. 29). Thereafter, Birch filed the petition with the NLRB on July 5, 2018. (Resp. Exhs. 26 – 28). In response, the Board issued a Notice of Petition for Election and Notice of Representation Hearing and directed Birch to serve NSL with the petition. (Resp. Exh. 29; Birch 1398:8-1402:25). Birch gave those documents to Belezarian as instructed. (Belezarian 2094; Birch 1395:12-15, 1400:1-1402:4). Belezarian asked Birch for a copy of the petition so she could verify if Birch had in fact obtained the appropriate number of signatures. (Belezarian 2096). Birch gave Belezarian a copy of the petition on July 5 or 6, 2018. (Belezarian 2097).

Throughout this period, Birch also continued to seek and receive advice regarding the decertification process (via phone and email) from Laura Pawle (Field Attorney) and Lisa Fierce (Board Agent) in the NLRB's Region 1 office. (Resp. Exhs 27-28; Birch 1396-1418). During one

such call with Pawle, Birch brought up the topic of withdrawal of recognition form the Union. Birch had first learned about withdrawal of recognition when she read about it on the NLRB's website. Birch "wanted to find a way to get this over a lot quicker than having to go through a hearing and then an election." Birch "explained to her how uncomfortable it was at work" and they discussed how long the election process would take. Pawle advised Birch that it an election is "usually 30 days after the hearing." (Birch 1416-18).

This timeframe was very disconcerting to Birch because "Union people were hanging up signs, people were just not getting along" and she "felt like it was affecting patient care." Birch "just wanted it to end as quickly as possible," which is why she contacted Pawle to "discuss whether or not an election was needed" and ask if "the company could just withdraw recognition." (Birch 1434-35). Pawle advised her that it could be done if over 50% of the employees had signed the petition. After receiving that advice, Birch approached Belezarian to inform her of Pawle's advice and let her know that "I thought we had over 50% of [the required] signatures and that we didn't actually have to go through with an entire election" if NSL withdrew recognition from the Union. (Birch 1435-36).

I. NSL Withdraws Recognition from the Union

Based on the petition disclaiming interest in continued representation, NSL withdrew recognition from the Union on July 6, 2018. NSL posted a notice to employees advising them of the withdrawal of recognition later that same day. (Jt. Exh. 7). On July 12, 2018, NSL posted a follow-up notice to address false rumors that employees would lose holiday pay as a result of the withdrawal of recognition. (Jt. Exh. 8). The July 12 notice assured employees that contrary to false information being circulated, NSL would not "implement any reduction of [the] wages and benefits which are currently provided." (Jt. Exh. 8). It also truthfully informed employees that

they would now technically have higher paychecks because Union dues would no longer be deducted. (*Id.*).

After NSL withdrew recognition, Teoli approached Birch and asked why she circulated the withdrawal petition. Birch responded that she was dissatisfied with the Union and did not believe it provided her with good faith representation. Teoli responded by acknowledging the problems with representation at the facility, and suggested making Birch a delegate. Birch declined the proposal. (Birch 1439:7-1440:6).

J. NSL Terminates Hirst and Minyo for Failing to Document and Report a "Reportable Incident"

1. Policies and Practices Related to Reportable Incidents

NSL policy and related health and safety laws require the facility's employees to report all incidents – no matter how minor – of potential patient abuse. As one Board witness testified:

> Q: … Do you know what kind of incidents are classified as reportable?
>
> A: Yes. Any witness or allegations of physical or verbal abuse, any incidences where one patient versus another patient, a slap on a wrist. You know, any kind of – as far as if you had one resident**,** "I want that cracker," and the other resident says, "No, you can't have my cracker," then this resident takes the cracker, the other resident slaps him. Anything like that's a reportable. A fall is reportable.

(Taber 405:9-18).

NSL provided substantial training on incident reporting and required all employees to understand their reporting obligations. (Minyo 874:6-19; Hirst 982:2-5). Employees understood that failure to promptly report an incident violated NSL and Department of Public Health policy and could result in termination. (Taber 424:17-22 [Q: … Is it your understanding of the policy … that if you're in a…certain nursing position and you're advised of a potential resident abuse issue you have an obligation to report it? A: Yes. Q: And a failure to report would be a violation of company policy, correct? A: Yes.]; Taber 425:1-4 Q: [Failure to report reportable incident] might

even be a violation of State Department of Health policy, correct? A: Yeah, it goes right up the chain. It's a violation, yeah.]; Resp. Exh. 20 ["Abuse allegations need to be reported immediately to management!!…Failure to report will result in termination of employment."]).

2. Hirst and Minyo Fail to Report (or Even Respond To) a Reportable Incident

On July 15, 2018, Stacy Hayes (CNA) observed a resident strike another resident with a doll. (Hayes 1526:14-19). The incident occurred a few feet from the nurses' station. (Hayes 1526:14-1527:1). Both of the residents were under Hirst's care at the time of the incident. (Hayes 1536:18-20 [Q: [B]oth of these individuals were assigned to [Karen Hirst] that day? A: Yes.]). Hirst and Minyo (non-union Assistant Director of Nursing) were sitting at the nurses' station at the time of the incident. (Hayes 1527:10-13, 1528:10-16, 1529:3-22).

Immediately after the incident occurred, Hayes verbally reported it to the nurses who were at the nurses' station – Hirst and Minyo. After doing so, Hayes moved one of the residents to another activity area to insure no further harmful contact was made. (Hayes, 1527:10-19, 1529:6-8). Ariana Federici-McCarthy (Activities Assistant) also witnessed the incident, as she was standing approximately ten feet from the nurses' station when it occurred. (Federici 793:1-3; Hayes, 1530:1-3). NSL policy required Hirst to report the incident to other management staff, who would then gather witness statements. Accordingly, Hayes presumed one of the management staff would take her statement during her shift. However, to Hayes' surprise, no one approached her during the rest of her shift to obtain a statement regarding the incident. (Hayes 1531:23-1532:13; Sousa 1571:19-23).

Concerned that incident protocol had not been followed, Hayes reported it again – this time to Cassie Sousa, Staff Development Coordinator. (Hayes 1531:8-10, 1571-72). Sousa was not in

the facility when the incident occurred and was not aware of it, but she immediately asked Hayes to prepare a statement. (Hayes 1532:14-23, 1533:2-10). In her statement, Hayes noted that:

> A resident "picked up [a] doll and hit her with it and proceeded to throw it at her. I grabbed the doll …while reporting it to [the] nurse. …Nurse Karen was nurse of both residents." (GC Exh. 61(g).)

(Hayes 1533:11-16). Federici also provided a written statement consistent with Hayes' statement:

> Sunday at 10:30 a.m.-ish, I was doing activities with other residents when I noticed [resident A] started getting mad and frustrated that [resident B] was sleeping at the table. She was waiving the doll at her and proceeded to hit [resident B] with the doll. The other activity and Stacy removed [resident B] from the table for her safety. … Stacey told the nurse Karen about the incident between [resident A] and [resident B].

(GC Exh. 61(h)).

Sousa reported the incident to Heather Perry (Director of Nursing) and Mallory O'Kane (MDS Coordinator). (Sousa 1573:14-1574:4; O'Kane 1631:22-1633:6). O'Kane, who is Minyo's cousin, commenced an investigation. After a thorough investigation that included numerous interviews and collection of written statements, it was determined that Hirst and Minyo violated the incident reporting policy by failing to report a reportable incident. The facility reported the incident to the Department of Public Health (per relevant law and NSL policy) and terminated both Hirst's and Minyo's employment. (Perry 1689:13-1690:2; GC Exh. 62).

Prior to her termination, Hirst had a substantial disciplinary record, particularly related to incident reporting, none of which she ever submitted to the grievance process. (Hirst 1040:9-11, 1041:6-8). For example:

- **July 11, 2017** – Hirst was disciplined for failure to report patient abuse. (Resp. Exh. 22).
- **December 6, 2017** – Hirst was disciplined for a second failure to report patient abuse and received a ***final written warning*** for this incident reporting violation. (GC Exh. 34).

- **June 25, 2018** – Hirst sent an intimidating text message to another employee, which resulted in formal disciplinary action. (Hayes 1545:1-22; GC Exh. KH 3).

The July 15, 2018 incident was Hirst's **third** failure to report a reportable incident and evidenced a consistent failure to follow a critical resident safety policy. Accordingly, she was terminated. (GC Exh. KH 10). That termination was not related to her pro-Union opinions or activities in any way.

With regard to Minyo, although this was her second failure to report, she was held to a higher standard as a member of the facility's management team and a director-level resident care provider. Minyo was not provided any favoritism or leeway based on her non-union status or for any other reason. Despite the fact that she was Belezarian's close friend, O'Kane's cousin and a member of management, NSL terminated her employment in order to insure patient safety and prevent further potentially dangerous failures to report. (Minyo 331:4-21; O'Kane 1634:1-3). Preserving patient safety was the sole reason for Minyo's termination, and there is no evidence to suggest it occurred for any other reason.

K. NSL Terminates Sullivan for Leaving Her Work Area During Work Time When She Was Responsible for Resident Care

On July 9, 2018, Laurie Silvia (Activities Aide) reported to Joe Little (Food Service Director) that Union delegate Stephanie Sullivan approached her in an aggressive manner and demanded that she put on a Union pin. During that exchange, Sullivan yelled and swore at Silvia, demanding that she "put the fucking thing on!" Silvia immediately felt threatened and upset and after this occurred. Moments later, she reported it to Little, and then immediately after that reported it to Belezarian in the facility's dining room. Silvia told Belezarian that the incident had happened in the dining room, which meant that Sullivan had left her station caring for residents during work time. (Silvia 673:9-674:11, 675:1-5, 676:15-17; Belezarian 2102:13-2102:13-

2103:16). NSL immediately commenced an investigation and suspended Sullivan pending the outcome.[5] (Silvia 680:16-681:7, 686:9-14; Resp. Exh. 15). Silvia refused. (Silvia 680:12-23)

The following day, Sullivan contacted Silvia and tried to coerce her into submitting a false statement regarding the incident. (Silvia 680:16-681:7, 686:9-14; Resp. Exh. 15). Silvia refused. (Silvia 680:12-23). Sullivan then sent Silvia several text messages over a three-hour period demanding Silvia call her and inquiring as to her whereabouts. When Silvia responded that she was not home and reiterated that she did not want to provide a statement, Sullivan refused to take no for an answer. (Resp. Exh. 15). Sullivan threatened Silvia, telling her to "just write the fucking paper" and said she was coming to Silvia's house to get a statement. (Silvia 680:24-681:7). Sullivan also told Silvia to "keep her mouth shut" at the facility. (Resp. Exh. 15). Silvia was so frightened by Sullivan's threats that she left her own home for several hours to avoid Sullivan. (Silvia 681:8-18).[6]

After completing its investigation, NSL terminated Sullivan's employment on July 11, 2018 for leaving her work area while not being signed out for break. (GC Exh. SS-1; Belezarian 2106).

L. Employees Present a Petition to Management Requesting Wage Negotiations

On July 26, 2018, a small group of employees approached Belezarian with a petition requesting that NSL negotiate with the Union over wages. (Brown 926:24-927:6; Nunes 448:3-8; Belezarian 2122). Importantly however, this petition did **not** indicate that signatories wanted the Union to remain their exclusive bargaining representative. Instead, the document merely stated:

[5] Suspension pending an investigation is the standard practice at the facility. (Belezarian 2103).

[6] Belezarian asked Silvia to provide a written statement regarding Sullivan's threats, but she was too afraid to do so. (Silvia 697:2-7; Belezarian 2103:13-2104:1).

> We, the undersigned 1199 members … are united for living wages that keep pace with the cost of living, and good benefits that allow us to care for our families. What we earn shouldn't be based on who we know, and we demand management comply with the law and provide us basic information about current wages. Management would love to get rid of our union so they don't have to negotiate with us and they can continue making shady side deals. It's time for they [sic] negotiate our wages with us! We know we're better off together!

(Jt. Exh. 3).

Based on the language and the informal nature of the document, Belezarian understood it to be nothing more than an attempt to secure higher wages – not an expression of majority support for union representation. Notably, the employees who submitted the petition concede that they were not disciplined or retaliated against in any way for doing so. (Brown 880, 927-28).

Furthermore, although some employees expressed concern that they might "get in trouble" for signing both the decertification petition and the wage negotiation petition, none of NSL's management team ever told employees they would be disciplined for signing the decertification and wage negotiation petitions. To the contrary – when, for example, Palmer nervously told Belezarian that she had signed both petitions and was afraid she may incur repercussions for doing so, Belezarian assured her that she could not get be in trouble for signing both documents. (Belezarian 2184). Indeed, there is no evidence that any employee who signed both petitions suffered any repercussions for doing so.

M. The Union and the Delegates Engage in Aggressive Bullying and Harassment of Employees and Conduct Improper Solicitation Activities

During the period following the withdrawal of recognition, several employees spent time collecting signatures and engaging in other Union-related activities during work time, while they were supposed to be caring for the facility's vulnerable residents. (*See* Taber 394:2-6 [Q: Did you sign that [pro-union] petition on work time? A: It would have been the beginning of my shift. Q: … Did doing that on work time concern you? A: No.]; Taber 403:23-404:2 [A: [Union] [s]tuff

would get done on work time, yes.]; Birch 1354:21-1356:5; Talbot 1900:23-1902:4).[7] During this period, the Union also engaged in aggressive bullying behavior. (Minyo 352:16-25, 356:8-9; Birch 1407:23-1408:6). For example, Stephanie Sullivan (CNA and Union delegate) pulled an employee who did not support the Union into a linen closet and shouted at her. (Minyo 357:22-359:18; 750:24-751:25, 771:13-19). Sullivan also told an employee to put on a "fucking [union] pin." (Silvia 673:9- 674:11, 676:15-17). The Union's representatives and delegates engaged in such severe bullying conduct that multiple employees began requesting escorts to their cars when their shifts ended and they had to walk to the parking lot.

N. Dawn Nunes Is Disciplined for Misconduct in November 2018

As of November 2018, Nunes was assigned to the East Wing of the Country Gardens facility. (Belezarian 2166:22-2167:2). On November 9, 2018, four nurses who also work in that same area came to Sousa with complaints that Nunes was subjecting them to ongoing harassment and unprofessional conduct. (Resp. Exhs. 30-33). These nurses included Caseiro, Picard, Nault and Birch. Nunes' conduct was so severe that three of the four nurses (Caseiro, Picard and Birch) threatened to resign. (Belezarian 2159:9-24). All four nurses subsequently gave written statements documenting their experiences and detailing Nunes' conduct. (Resp. Exhs. 30-33).

The nurses' statements revealed a consistent and ongoing pattern of improper behavior. Caseiro stated that Nunes' disrespectful behavior towards her and other staff was making her so uneasy and fearful that she was no longer comfortable working on the same unit as Nunes. (Resp. Exh. 31). Similarly, Picard stated that she too was uncomfortable as a result of Nunes' conduct and was "constantly looking over [her] shoulder" because she was so wary of Nunes. (Resp. Exh.

[7] Even though the Union collected signatures and engaged in other Union-related activities during work time, employees (including delegates) were never disciplined for doing so. (Brown 927:7-13, 928:9-12).

32). Consistent with these complaints, Nault stated that the conduct towards her and other nurses was so unprofessional and threatening that she too was considering resigning and seeking work elsewhere "due to [the] hostile environment I work in." (Resp. Exh. 33). Birch experienced the same hostility and unprofessional behavior from Nunes, noting that "I cannot work with [her] any longer" due to the hostile work environment she had created for Birch and other staff on the unit. (Resp. Exh. 30).

Notably, Birch also stated that she believed Nunes' harassment and hostility was in retaliation for efforts in connection with the decertification petition. (*Id.*). Nunes appears to have directed harassing and hostile conduct towards Birch (and other nurses) in retaliation for those nurses' views on unionization. That conduct was so severe that it rose to a level where Birch believed that patient care and safety were being compromised. (*Id.*).

In response to these incidents, on November 14, 2018, a disciplinary meeting was held with Nunes. (Veno 2432:14-2436:21). Because Nunes had created a hostile work environment in violation of the Employer's policies, including the code of conduct and the policies prohibiting harassment and retaliation, she was issued a final warning. (Veno 2515:4-2516:1). At that time, the Employer also transferred Nunes to another unit in the facility, in hopes that she could improve her performance there. Although Nunes' misconduct rose to a level that warranted her termination, the Employer instead imposed this lesser written discipline and transfer. (Veno 2437:16-2438:3; Belezarian 2163:6-25). Nunes was granted this leniency in part because she only had coachings in her disciplinary file rather than write-ups for more serious infractions.

Shortly after expiration of the 90-day period, Nunes resumed working on the east wing of the facility. (Veno 2318:12-14; Belezarian 2167:3-13).

III. ARGUMENT

A. Summary of General Counsel's Allegations

The General Counsel asserts a wide range of claims in its Third Consolidated Complaint. (GC Exh. 50). NSL's purported violations of the Act as alleged in that pleading are outlined below:

Sections of the Act Purportedly Violated	Factual Allegations
§§ 7, 8(a)(1)	Belezarian told per diem employees they would keep their higher wage rate if they took a regular position.
§§ 7, 8(a)(1)	Belezarian told employees to ignore what the Union said about wage rates.
§§ 7, 8(a)(1)	Belezarian told employees not to discuss wage rates.
§§ 7, 8(a)(1)	Belezarian assisted with and encouraged the decertification effort.
§ 8(a)(1), (5)	Belezarian paid employees 1.5/2.0 times the standard rate to cover open shifts and call outs to influence employees to reject the Union.
§ 8(a)(1)	Belezarian promised employees they would receive pay raises once the Union was out of the facility.
§ 8(a)(1)	Belezarian threatened employees if they signed both petitions.
§ 8(a)(1), (5)	Belezarian solicited employees to resign from Union by encouraging them to sign document removing them from the facility, and encouraging them to enter into individual contracts with an agency.
§§ 7, 8(a)(1)	NSL told employees that the Union demanded that NSL reduce the wage rates for new hires and rescind recent wage increase.
§§ 7, 8(a)(1)	NSL engaged in unlawful surveillance while the union collected signatures for its petition.
§§ 8(a)(1), (3)	NSL terminated Sullivan, Hirst, Minyo, and Nunes.
§§ 8(a)(1), (5)	NSL hired new employees at wage rates above what the CBA provides without providing the union notice or bargaining, and without providing the same pay to employees with the same or greater experience.

Sections of the Act Purportedly Violated	Factual Allegations
§§ 8(a)(1), (5)	NSL failed to provide union with information regarding wage rates and pay increase.

B. Key Factual Allegations Underlying the Board's Claims Lack Adequate Record Support and/or Do Not Violate the NLRA

Many of the General Counsel's claims in this dispute are based largely, if not entirely, upon alleged statements by NSL management. Specifically, the General Counsel alleges that management unlawfully told employees: (a) not to discuss wages; (b) to ignore the Union's commentary on wages; (c) that the Union had demanded a wage reduction; (d) they would receive a wage increase when the Union was out of the facility; (e) that per diem CNAs who accepted bargaining unit positions could keep their per diem wage rates rather than dropping to contractual CNA start rates; and (f) they would be disciplined if they signed both the decertification and wage negotiation petitions. However, for all of these purported statements, the evidence establishes that NSL management either: (1) never made the alleged statement at all; or (2) the statement was made but was entirely lawful and did not violate the Act.

1. Alleged Statements Regarding Wage Reductions and "Ignoring the Union" Do Not Violate Section 8(a)(1) and are Protected by Section 8(c)

"Section 8(a)(1) of the Act makes it unlawful for an employer…to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." *FJC Sec. Servs., Inc.*, 360 NLRB 32, 34 (2013). An employer's statements only violate Section 8(a)(1) if they have a reasonable tendency to interfere with an employee's rights under Section 7. *Id.* Accordingly, any statement by management that the Union wanted to rescind certain wage increases, or that employees should ignore the Union's comments, was entirely lawful as it did not interfere with

employees' Section 7 rights in any way. Indeed, the statements do not contain an express or implied threat, nor do they purport to prohibit any protected activities. Thus, by definition they do not violate Section 8(a)(1). Moreover, even if these statements had run afoul of Section 8(a)(1), they would be protected by the Act's free speech provision.

Section 8(c) of the Act gives employers broad rights to express "any views, argument, or opinion" on union-related matters. 29 U.S.C. § 158(c). This provision "implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Neither a union nor the Board can infringe on an employer's "free speech right to communicate his views to his employees." *Id.* Indeed, employers even have "the right to express an antiunion opinion to employees." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). Moreover, employers are free to express opinions or make predictions that are reasonably based in fact. *See Waste Stream Mgm't, Inc.*, 315 NLRB 1099, 1115 (1994). Despite the General Counsel's allegations to the contrary, such statements are entirely lawful.

For example, the General Counsel alleges that a June 29, 2018 memorandum summarizing Teoli's objections to the CNA start rate increases was unlawful. (Jt. Exh. 3). But the memorandum states facts that multiple witnesses confirmed at the hearing – that the Union demanded NSL revoke the pay raise it had already implemented. (*See* Teoli 653:9-654:6; Birch 1363:6-11; Belezarian 2068:4-10). This statement in the June 29, 2018 memorandum was not a fabrication; it is undisputed that Teoli explicitly demanded (several times, including during a vulgar tirade in a June 12, 2018 meeting) that the increases be revoked, the Union delegates told countless bargaining unit CNAs they would be getting pay cuts, and many of those employees came to management in tears seeking assurances that they would not have their wage rates reduced. (*See e.g.*, Birch 1362, 1475, 1478; Hayes 1547, 1549; Palmer 202; Minyo 311, 360; Belezarian

2073:10-2075:17, 2074). Accordingly, the statements in the memorandum were entirely accurate. Moreover, the memorandum did not contain any promises or threats designed to chill or otherwise influence employees exercising their Section 7 rights. Accordingly, the evidence demonstrates that NSL's memorandum was accurate, lawful and protected by Section 8(c). *See Terminix Int'l Co., L.P.*, 315 NLRB 1283, 1288 (1995) ("[A]n employer may lawfully furnish accurate information…if it does so without making threats or promises of benefits.").

Similarly, there is no basis for the General Counsel's contention that it was unlawful for Belezarian to tell employees they should ignore delegates' statements regarding wages. As an initial matter, the only record evidence suggesting Belezarian made any such statement came from Talbot, who testified Belezarian told her: (1) the facility would not reduce employees' hourly rates; and (2) that she could ignore the delegates' representations to the contrary. (Talbot 1918:8-16, 1918:22-25). In other words, Belezarian made the lawful remark that NSL would maintain the status quo with respect to wages, and that Union representations to the contrary were false. *See Ernst Home Ctrs., Inc.*, 308 NLRB 848, 853 (1992) (even where an employer "favored decertification," it did not violate the Act by telling employees would "lose nothing" if decertification occurred); *Crown Chevrolet Co.*, 255 NLRB 826, 826 n.3 (1981) (employer can lawfully promise to maintain the status quo).

Moreover, Belezarian's suggestion that Talbot ignore the Union's false statements regarding threatened wage decreases constitutes nothing more than a critical assertion that such statements lacked credibility, which is entirely lawful. *See Children's Ctr. for Behavioral Dev.*, 347 NLRB 35, 35 (2006) (employer may criticize or even disparage a union without violating Section 8(a)(1)). Indeed, Belezarian was lawfully entitled to express her opinion regarding the Union, negative or otherwise. This includes making critical statements as to the Union delegates'

credibility, statements which the evidence established were well-founded. There is simply no basis to hold that management opining that an employee should ignore a union's false threats regarding wages is somehow lawful; such assertions are clearly protected by Section 8(c). *See, e.g.*, *Roseburg Lumber Co.*, 278 NLRB 880, 887 n.18 (1986) (statement that "employees had to be stupid to want a union…is merely the expression of an opinion privileged under Sec. 8(c) of the Act."); *W&F Bldg. Maint. Co.*, 268 NLRB 849, 854 (1984) (stating "it was a waste of money to join the Union" and that employees' job security "was not with the Union but in doing good work" were expressions of opinion privileged under Sec. 8(c)); *Cent. Plumbing Specialties, Inc.*, 337 NLRB 973, 974 (2002) (employer's statement that a "union is unfair to employees and too expensive for the employer" is protected by Section 8(c)).

2. Telling Per Diem Employees They Would Keep Their Wage Rates if They Became Full-Time Employees Did Not Violate Section 7 or 8(a)(1)

The General Counsel contends that NSL violated Sections 7 and 8(a)(1) by telling per diem CNAs they would retain their wage rates, rather than dropping to the CBA minimum, when they accepted full-time bargaining unit positions. (GC Exh. 50 ¶¶ 8(a), 31). This absurd contention is explicitly refuted by the plain language of the parties' CBA.

The CBA **expressly** authorized NSL to pay employees "above the minimum start rate," and that is all it did here. (Jt. Exh. 1, Art. 5). NSL employed non-union per diem CNAs who were paid $14.00 per hour. When NSL hired some of those per diem CNAs into bargaining unit CNA positions, it kept them at their $14.00 rate rather than reducing them to the contractual CNA start rate of $11.50. The uncontroverted testimony during the hearing established that NSL paid new CNAs this increased start rate in order to stay competitive in the market, retain employees, and reduce the use of agency staff. (Belezarian 2233, 2266:12-20). There is no evidence that the purpose or effect of permitting per diem employees to retain their wage rate was to interfere with

employees' rights under the Act. More importantly however, it is undisputed that Article 5.1 of the CBA explicitly states that "**[t]he Employer may hire above the minimum start rate**." The General Counsel's alarming disregard for the fact that NSL had the unilateral right to increase the CNA start rates – as unequivocally and unambiguously stated in Article 5.1 – speaks volumes as to the baseless nature of its allegations against the Company. In any event, the ludicrous contention that NSL telling per diem employees it intended follow the express language of its CBA somehow violated Sections 7 and 8(a)(1) is meritless and wholly unsupported by the record.

3. There is No Credible Evidence that Belezarian Made Unlawful Comments to Employees

The General Counsel alleges that in late 2018, Belezarian told employees that: (a) they should not discuss wages; (b) they could be disciplined for signing both the June 2018 decertification petition and the July 26, 2018 wage-related petition; and (c) they would receive a pay raise once the Union was no longer their bargaining representative. (GC Exh. 50 ¶¶ 8(c), 9). The record does not support these assertions.

a. There is No Evidence Employees Were Instructed Not to Discuss Wages

Multiple witnesses testified that no management employee ever told them that they should not discuss their compensation with co-workers. (Gaeta 152; Minyo 345; Talbot 1918:17-21). To the contrary, NSL staff routinely discussed their compensation at work. (Gaeta 70-71, 82-84). Wages and other work-related matters were also the subject of monthly labor-management relations meetings, and were freely discussed between management and employees in such meetings.

b. No Employee Was Told She Would Be Disciplined For Signing the Decertification Petition or the Wage-Related Petition

The General Counsel alleges that Belezarian unlawfully threatened employees with discipline for having signed both Birch's decertification petition and a subsequent wage-related petition. Like the General Counsel's other claims, this allegation finds no support in the record evidence. As an initial matter, there is only one employee who allegedly discussed having signed both petitions – Palmer. In that instance, it was Palmer who approached Belezarian to express concern that she had signed both petitions and worried she may face discipline as a result. However, Belezarian did not threaten Palmer or suggest she would face any such repercussions. To the contrary, Belezarian responded to Palmer's concerns by telling her that decisions regarding unionization were for Palmer to decide herself. (Palmer 212-13). Moreover, it is undisputed that Palmer was never disciplined or retaliated against in any way for having signed both petitions.

In a similar vein, at least seven witnesses confirmed that Belezarian did not involve herself in the decertification effort or suggest that a post-withdrawal pay increase was on the horizon; did not ask employees for their opinions on the Union, ask employees if they signed the petition, or promise any future wage increases related to the decertification efforts. (Sherman 289:11-22, 292:14-17; Talbot 1911:24-25, 1912:12-17, 1912:24-1913:1; Minyo 313:4-20, 330:15-22, 356:10-15; Gaeta 112:16-25, 132:19-22; Nault 1987:2-11; 1994:14-23; O'Kane 1658:16-20; Sousa 1596:20-1597:8; Picard 1853:20-21, 1864:8-1865:2). Indeed, one of the General Counsel's own witnesses confirmed Belezarian's neutral stance regarding the decertification petition, testifying: "I wouldn't say we were promised any benefits if we filled out the document[.]" (Gaeta 112:16-25; Caseiro 1823:17-24).

The General Counsel's failure to introduce even a scintilla of evidence to support these allegations is fatal to its claims.

C. Belezarian Did Not Unlawfully Solicit Employees to Resign From the Union

The General Counsel contends the Belezarian violated Section 8(a)(1) and (5) by "encouraging" employees to resign from NSL and the Union and begin working through a staffing agency. (GC Exh. ¶ ¶ 30, 34). The General Counsel's allegation arises from the June 2018 meeting where Gaeta, Talbot, Cabral, and Palmer met with Belezarian to discuss their concerns regarding the Union's demands to revoke CNA wage increases, and its direct threats to individual employees that they would receive wage reductions and should "not get comfortable" with their existing wage rates. In response, Belezarian provided truthful and accurate information to those employees, which was entirely lawful.

The conversation at issue was a discussion where bargaining unit members – without any management prompting – expressed concerns in response to demands and threats the Union was making related to their wage rates. The CNAs asked Belezarian what options they had in seeking to avoid such wage reductions and hopefully, securing wage increases. (Belezarian 2073-76). Belezarian responded that she saw three different avenues available to them to pursue those goals. First, they could wait for the next round of contract negotiations, which would occur in October when the CBA expired, and seek increases during those negotiations. Second, they could work for a staffing agency and request to be assigned to the facility. This would allow them to continue working in the same location, and may result in a pay increase since staffing agencies generally paid more than regular employers. Third, they could "pass a petition" and if the Union was subsequently voted out by the employees, it would no longer represent them and could not seek to influence their wage rates. (Gaeta 154). Importantly, Belezarian did not provide any opinions or advice regarding the three options, nor did she offer any instructions or details on how to effectuate them (*e.g.*, by telling them how to pursue decertification). Furthermore, Belezarian did not suggest

that any of these options would guarantee them a pay raise or make any promises to that effect. (Minyo 330, 356; Gaeta 152-53, 156-57).

None of this conduct violated the Act. For example, it is well-settled that an employer does not violate the Act by providing employees with information on how to resign from a union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *Manhattan Eye, Ear and Throat Hosp.*, 280 NLRB 113, 114 (1986). When an employee makes inquiries related to resigning from a union, an employer may lawfully provide information so long as it does not encourage or discourage resignation. In fact, an employer does not even violate the Act by "furnish[ing] employees with resignation language" and instructing employees on how to effectuate their withdrawal from a union. *Mosher Steel Co.*, 220 NLRB 336, 337 (1975) (employer did not violate the Act by providing resignation language where employees voiced concern union may cause them economic harm). Indeed, absent a threat, an employer may lawfully advise employees of "their right to resign from the union" and provide a letter with suggested language to facilitate the resignation. *Peoples Gas Sys., Inc.*, 275 NLRB 505, 507 (1985); *see also Perkins Machine Co.*, 141 NLRB 697, 700 (1963) ("Respondent acted lawfully in bringing to the attention of its employees their contractual right to resign from the Union and to revoke their dues deduction authorizations.").

Here, Belezarian never engaged in any prohibited encouragement to resign from or to decertify the Union. Instead, Belezarian merely provided truthful and lawful responses to the employees' inquiries. Although the employees responded to that truthful information by expressing interest in pursuing agency positions, Belezarian neither encouraged nor induced them to do so. In point of fact, Belezarian did just the opposite – when she later determined upon

reflection that the agency option she described to the employees was probably impractical, she immediately discarded the resignation letters they had given her to insure they would not end up without jobs by making a rash decision. Moreover, if Belezarian's intent in identifying working for an agency as one of the employees' options was to interfere with or discourage their exercise of their rights under the Act, it strains logic to suggest she would then decide just a few hours later that pursuing this option was a bad idea. To the contrary, she would have encouraged them to pursue it and sought to convince all the other CNAs to do the same. The fact that she did not further underscores the baseless nature of the General Counsel's allegations.

D. NSL Did Not Improperly Compensate Bargaining Unit Employees

1. NSL's Implementation of Higher CNA Start Rates Was Based on a Reasonable and Correct Application of the CBA

The General Counsel contends that NSL violated Section 8(a)(1) and (5) by hiring new CNAs (some of whom were former non-union per diem CNAs) at rates in excess of the contractual minimum of $11.50. (GC Exh. 50 ¶¶ 8, 31). The General Counsel's argument is based on a confusing disregard for the plain language of the CBA, which states:

> **The Employer may hire above the minimum start rate.** If the Employer hires an employee above the minimum start rate, based on their qualifications and years of experience, current employees in the classification with the same or greater experience with the Employer shall be paid no less than the new employee. The Employer will notify the Union prior to giving any mid-term wage increases.

(Jt. Exh. 1, Art. 5.1) (emphasis added).

This provision negates the General Counsel's allegations on numerous grounds. First, it is axiomatic that a CBA provision explicitly conferring a right on an employer does not somehow obligate the employer to engage in bargaining before exercising that right. Here, any obligation to bargain over the ability to increase CNA start rates was met when the parties bargained over the langue of Section 5.1, which they agreed would give NSL the unilateral right to increase such start

rates. Second, NSL was not obligated to pay any employees – new hires or otherwise – at the minimum CBA rate of $11.50 per hour rather than at a higher rate. While NSL admittedly could not pay employees *below* the contractual minimum, it was not prohibited from paying *above* that amount.

Third, Article 5.1 provides that if a new hire receives more than the contractual minimum ***based on her qualifications and experience***, existing employees with the same or greater experience and qualifications shall receive no less than the new hire. However, if a new hire receives more than the contractual minimum based on ***some reason other than*** her qualifications or experience, there is no requirement in Article 5.1 (or anywhere else in the CBA) that existing CNAs would also receive increases and/or that the Union receive advance notice of any such increases that NSL might voluntarily implement. This is a critical distinction, as the General Counsel incorrectly objects to NSL's conduct surrounding pay increases implemented for three of the existing CNAs in May 2018.

Specifically, the General Counsel contends that NSL violated the CBA by not raising those CNA's compensation earlier (*i.e.*, when it hired other CNAs at $14.00) and by failing to notify the Union prior to raising their rates. However, this allegation also arises from either a misapplication or an outright disregard for the plain language of Article 5.1. Pursuant to that provision, NSL is only required to increase the rates of existing CNAs if: (1) a newly-hired CNA is paid a start rate above the contractual minimum "based on their qualifications and years of experience; and (2) the existing CNA has at least the same amount of experience. However, that requirement is not triggered where, as here, NSL paid new CNAs above the CBA start rate *to ease its ongoing staffing shortage* rather than because of the new CNA's qualification and experience levels.

The General Counsel did not introduce any evidence establishing that NSL increased the CNA start rates based on incoming CNAs the $14.00 years of experience. To the contrary, witnesses testified that the new CNAs actually had little or no experience. (Minyo 306:13-16; Veno 2363:20-2364:3). Accordingly, any contractual obligation NSL had to increase start rates for incumbent CNAs was inapplicable, as that requirement is only triggered where start rates are raised to entice highly experienced employees to accept positions.

Importantly, when an employer argues that its contract "did not prohibit the challenged conduct, the Board will not ordinarily find a violation if the employer's contractual interpretation has a sound arguable basis." *Knollwood Country Club*, 365 NLRB No. 22 (2017); s*ee also, Phelps Dodge Magnet Wire Corporation*, 346 NLRB 949, 952 (2006) (holding that even erroneous interpretation and application of CBA is lawful so long as it has a "sound arguable basis."). Here, it is not necessary to interpret any vague or obscure contract language – the language clearly and explicitly states that NSL was empowered to raise the minimum start rates. Indeed, because the parties' dispute in this regard is fundamentally contractual, "reasonable interpretation" is the governing standard. *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. 9 (2019).

Moreover, the General Counsel's attempt to argue that NSL made an impermissible unilateral change, while simultaneously arguing a point of contract interpretation, is a legally flawed assertion. Indeed, it is an error to apply both contract modification and unilateral change theories to an employer's conduct, "as these theories are mutually exclusive." *Id.* at slip op. 8. For all these reasons, the General Counsel's allegations must fail.

2. Providing Incentive Payments for Employees Working Open Shifts Was Permissible

The Board alleges that beginning in January of 2018, NSL began offering incentives for employees to work open shifts "in order to influence employees to reject the Union as their

bargaining representative." (GC Exh. 50 ¶ 7). This allegation is legally and factually nonsensical.

It is undisputed that the facility began offering incentive payments to employees to work open shifts beginning in approximately April 2017 during a time of extreme staffing shortages. This practice, which was implemented with the full knowledge and consent of the Union through its delegates (and was in fact first suggested *by a Union delegate*), was not even remotely related in time or in scope to the Union's loss of majority support in July 2018. There was not a shred of evidence introduced that allows even a strained inference that the facility offered incentives to cover dangerously low staffing shortages as part of some grand plan to influence employees to reject the Union fifteen months later.

Furthermore, as noted above, the incentives were the brainchild of a Union delegate and another CNA. Once implemented, these incentives were regularly offered by and enjoyed by the Union delegates and other CNAs. (Sherman 275; Palmer 178:4-179:8). Although the General Counsel attempted to show the delegates received these incentives less frequently than other employees, the only actual evidence introduced regarding the frequency of delegates working incentivized shifts established that their repeated *rejection* of those shifts explained any supposed assignment disparity. It is telling that the delegates never objected to the provision of such incentives from April 2017 through July 2018 as a means to address staffing issues. (Sherman 276-78).

It is also notable that there was no evidence proffered by the General Counsel suggesting that the incentive payments were intended to and/or actually had the effect of undermining support for the Union. The uncontroverted testimony from management and Union witnesses was that NSL had serious and consistent staffing issues and regularly had to use incentives to get employees to work weekend shifts. The incentives had one purpose – to ensure compliance with state

regulations regarding staffing ratios – and had no tendency to interfere with employees' rights under the Act in any way.

In addition, to the extent the General Counsel objects to any alleged failure to bargain over the incentive payments, that argument also fails. NSL openly offered the delegate-created incentives for well over a year without objection from the Union. It is undisputed that the Union delegates were all well aware of these incentives being offered. Indeed, the delegates used them to help fill open shifts, and often received them for accepting such shifts themselves. The Union has an obligation to act diligently in asserting its bargaining rights. *See, e.g.*, *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) ("lack of diligence by a union amounts to a waiver of its right to bargain"). Here, by enjoying the benefits of the incentives for more than a year without objection, the Union waived the right to bargain over the use of such incentives. *See Kansas Nat'l Education Ass'n*, 275 NLRB 638, 639-40 (1985) (union waived its right to bargain over mandatory subject when it waited one month after employer took action to protest). Indeed, by protesting the incentives after happily taking full advantage of them for over one year, the Union is simply underscoring the duplicitous nature of its claims. Such conduct should not be rewarded.

E. The Withdrawal of Recognition From the Union Was Lawful

1. NSL Appropriately Withdrew Recognition From the Union

It is well settled that an employer may withdraw recognition from an incumbent union that has lost the support of the majority of the bargaining unit. *See Levitz Furniture Co.*, 333 NLRB 717 (2001). An employer can withdraw recognition after expiration of a CBA or at any time during which a valid election petition can be filed (in this case, beginning on July 3, 2018). *See Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969, 969 (1982); *Trinity Lutheran Hosp.*, 218 NLRB 199, 199 (1975) ("[A]ll petitions filed more than 90 days but not over 120 days before the terminal date

of any contract involving a health care institution [are]…timely."). Similarly, anticipatory withdrawal of recognition is lawful if the employer demonstrates that that it had evidence of a lack of majority status "on the date of withdrawal." *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB at 969. In order to withdraw recognition, the "employer must prove loss of majority by a preponderance of the evidence." *Diversicare Leasing Corp.*, 351 NLRB 817, 818 (2007).

Importantly, the General Counsel does not dispute that a majority of employees expressed disinterest in continued representation on July 6, 2018, the date NSL withdrew recognition. Rather, it seeks to undermine the showing by pointing to various alleged unlawful conduct – *i.e.*, alleged unlawful statements and assistance of the decertification effort. As discussed below, these attempts fall flat. (*See infra* III.E.2-3).

To the extent General Counsel objects on the grounds that the withdrawal occurred weeks prior to expiration of the CBA, its objection fails. By operation of the Board's own rules, an election and the resulting a decertification can occur within 13 days of a petition filed 120 days before contract expiration. *See* 29 C.F.R. § 102.60, *et seq.* Thus, the Board's rules permit the termination of union representation nearly four months before a CBA expires. Moreover, even if a party implements a premature withdrawal of recognition, subsequent challenges to that withdrawal must fail where they seek to reinstate recognition *after the CBA would have expired*. *See Burger Pits, Inc.*, 273 NLRB 1001, 1002 (1984) (even where withdrawal is premature, Board will not compel recognition or remedy unilateral changes after the date that contract would have expired). Here, NSL withdrew recognition less than four months before the contract would have expired on October 31, 2018. Accordingly, the withdrawal was not premature, and even if it had been, we are now nearly *ten months* past the contract expiration date, so it would be improper to compel recognition.

2. The General Counsel's Allegations Regarding the Authenticity of Birch's Petition Are Meritless

The General Counsel seeks to explain away the employees' undisputed demonstration of their desire to decertify the Union by alleging that NSL gave them improper assistance that tainted the petition. The General Counsel also contends that the July 26, 2018 wage negotiation petition somehow negates the earlier decertification petition.

As discussed above, NSL did not assist Birch in connection with the petition in any way. (*See supra* II.H). Birch decided to circulate the petition on her own, independently contacted the NLRB for guidance, and collected signatures surreptitiously over a few short days. Indeed, management did not even learn of the petition until Birch has obtained nearly all of the necessary signatures. Birch's petition was lawful and was not inappropriately facilitated or encouraged by NSL. *See generally Bridgestone/Firestone, Inc.*, 335 NLRB 941, 942 (2001) (employer that did not improperly assist decertification where it "draft[ed] the decertification petition" for the employee).[8]

While the complaint makes no allegations in this regard, General Counsel proffered testimony suggesting that NSL facilitated or encouraged the petition by making $500 payments to Birch in exchange for circulating the petition, and enforcement of NSL's non-solicitation policy.[9] The payments to Birch were not for circulating the petition, they were a referral bonus and a

[8] While it is not alleged in the operative complaint, at the hearing, the Board suggested that NSL made two $500 payments to Birch to reward her for circulating the decertification petition. This is false. Birch received a $500 bonus for referring Caseiro and a $500 as a sign on bonus. (Belezarian 2196). She also received a payment when she completed her probationary period. (Belezarian 2196:2-2197:9). Other employees – including Sullivan and Hirst – received similar payments. (Belezarian 2242; Picard 1867:25-1868:15).

[9] NSL notes that the General Counsel does not challenge the facial validity of the facility's no-solicitation policies.

signing bonus. (Belezarian 2195:22-2197:9; Birch 1441:1-2, 1470:13-16, 1516:13-18, 1516:23-25). Other employees were eligible for and received similar payments. (Belezarian 2196:12-15; 2242, Birch 1517:3-5; Picard 1868:7-15).[10]

Furthermore, unfair labor practices can only taint a withdrawal of recognition if they are "of a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *see also Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004) ("[N]ot every unfair labor practice will taint evidence of a union's [] loss of majority support."). Thus, to nullify Birch's petition based on alleged unfair labor practices, the General Counsel must set forth "specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lexus of Concord, Inc.*, 343 NLRB at 852. Here, the few relevant events predating the petition were entirely lawful and none were shown to have caused the Union's loss of majority support. (*See supra* III.B). The record does not contain <u>any</u> evidence that NSL's alleged pre-withdrawal conduct undermined the Union's support in the facility. *See, e.g., LTD Ceramic, Inc.*, 341 NLRB 86, 87-88 (2004) ("While the unfair labor practice was relatively close in time to the withdrawal of recognition, there is no showing that it had a detrimental or lasting effect on employees, diminished the standing of the Union in their eyes so as to cause their disaffection, or adversely affect employees' morale, organizational activities, or union membership.").

[10] General Counsel proffered an unsigned handwritten document, allegedly from Birch, purporting to show that NSL agreed to pay her for working an 11:00 a.m. to 7:00 p.m. shift. (*See* GC Exh. 33). Birch denies writing this statement, noting that she does not write in print and if she did write such a statement, she would not have addressed it to HR. (Birch 1442:1-13, 1468:5-10). The testimony also confirms that Birch never received a bonus payment in exchange for working an 11:00 a.m. to 7:00 p.m. shift. (Birch 1441:11-14). It is worth noting, however, that even if Birch did receive a payment for that purpose, it would still have no bearing on the key allegation that she was paid to pursue decertification efforts.

Furthermore, the General Counsel's contention that the July 2018 collection of signatures requesting wage negotiations negated employees' prior showing is simply incorrect. NSL had uncontroverted evidence of a lack of majority support *at the time of withdrawal*, which is the only time period that is relevant - that is all the law requires. *See Abbey Medical/Abbey Rents, Inc.*, 264 NLRB at 969. In addition, even if a petition submitted after the withdrawal of recognition could have some legal effect on the first petition, there is no basis to assign such effect here.

Indeed, a petition regarding majority interest and representation must express a clear statement regarding employees' position. Here, Birch's petition requests an immediate withdrawal of recognition, a clear and unequivocal statement of employee intent. Conversely, the July 2018 petition does not contain <u>any</u> indication, much less a clear indication, that the signatories want the Union to remain as their exclusive bargaining representative. A petition requesting that the employer negotiate over wages cannot somehow be read as an unequivocal showing of majority interest in union representation that negates an earlier unequivocal majority disinterest. *See Highlands Regional Med. Ctr.*, 347 NLRB 1404, 1404-07 (2006) (vague document insufficient to have legal effect regarding representation); *Kobacker Co.*, 308 NLRB 84, 89-90 (1992) (petition stating that "we would like to have a vote on whether to have a union or not" is too vague regarding representation).

For all these reasons, the General Counsel's allegations regarding purported deficiencies in Birch's petition and/or unlawful conduct related to that petition lend no support to its claims and they must be rejected.

3. Birch Was Not Permitted to Engage In Improper Solicitation Activities

Multiple employees testified that NSL did not knowingly permit <u>any</u> employees to engage in solicitation or distribution, whether union-related or otherwise, during work time. For example,

O'Kane – the Scentsy representative who allegedly distributed material – testified that she never sold or otherwise distributed material during work time in work areas. (O'Kane 1661:12-1663:12). O'Kane made clear that she would not solicit during worktime because NSL would prohibit her from bringing Scentsy to the workplace doing forward.

Moreover, allowing medical vendors (*e.g.*, Beacon Hospice) to leave trinkets (*e.g.*, pens, lanyards, etc.) at the workplace would not invalidate NSL's no-solicitation policy. *Allied-Signal, Inc.*, 296 NLRB 211, 218 (1989) (permitting solicitation for United way for flowers for employee did "not establish disparate application of the Employer's no-solicitation/no-distribution rule."); *Ameron Automotive Centers*, 265 NLRB 511, 512 fn. 10 (1982) (nonemployee tool vendors who were permitted to solicit sales on premises were not a basis for finding discriminatory enforcement of no-solicitation rule); *Central Solano County Hospital Foundation, Inc.*, 255 NLRB 468 (1981) (hospital did not impermissibly enforce no-solicitation rule by permitting drug companies to set up display booths in the central corridor.

F. The Three Employee Terminations Were Entirely Lawful

1. Minyo Was a Statutory Supervisor and Was Not Protected Under the Act

"It is axiomatic that supervisors are excluded from the protection of the Act." *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006). Accordingly, "an employer may lawfully discharge a supervisor for engaging in prounion conduct even though such a discharge could cause employees to reconsider or abandon their own protected concerted activity." *Id.*; *see also Berg Product Design, Inc.*, 317 NLRB 92 (1995) ("The Board has consistently recognized that an employer may discharge a supervisor for union activity.").

To circumvent this rule, the Board contends that NSL terminated Minyo's employment because she refused to commit an unfair labor practice by preparing a false statement to effectuate

Hirst's termination. However, there is no evidence or testimony to support this strained claim. As the discussion below demonstrates, NSL terminated Hirst and Minyo for patient care issues attested to by multiple employees. (*See infra* III.F.2).

Contrary to Minyo's suggestion, her personal friend (Belezarian) and cousin (O'Kane) did not facilitate her termination because she refused to commit an unfair labor practice. They did so for her second failure to report a patient care incident, a fact that Minyo largely acknowledged when first confronted with the allegations. The record simply does not support the contention that NSL terminated Minyo for her refusal to commit an unfair labor practice.

2. NSL Lawfully Terminated Hirst, Minyo and Sullivan Based on Policy Violations and Substandard Performance

In cases involving alleged unlawful discharge, the petitioner must demonstrate that protected union activity played a role in the employer's decision such that the termination amounted to unlawful retaliation. *See Wright Line,* 251 NLRB 1083, 1089 (1980). The three "elements commonly required to support the initial showing are [1] union activity by employees, [2] employer knowledge of that activity, and [3] union animus on the part of the employer." *Flagstaff Med. Ctr. Inc.*, 357 NLRB 659 (2011).

The petitioner must show protected activities were a "substantial or motivating" factor in the discharge or other employment change. *Wright Line*, 251 NLRB at 1089. Only if the petitioner can establish its *prima facie* case does the burden shift to the employer to offer a legitimate, non-discriminatory reason for its actions. *See Nat'l Steel & Shipbuilding Co.*, 324 NLRB 1114, 1117 (1997). The employer can then prevail if "it would have reached the same decision absent the protected conduct." *Wright Line*, 251 NLRB at 1086-87; *see also Neptco, Inc.*, 346 NLRB 18, 21 (2005) ("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws."). If the

employer demonstrates a legitimate business reason for taking action, the employer prevails unless petitioner can demonstrate that the reason is "sham" or "false." *Wright Line*, 251 NLRB at 1084.

General Counsel principally predicates its unlawful discharge claims on alleged anti-union statements, and the timing of the discharges in relation to the various workplace petitions. But neither of these create a *prima facie* case of unlawful discharge. As discussed above, the contested remarks were lawful and protected by Section 8(c). (*See supra* III.B). Moreover, "mere coincidence [in time] is not sufficient evidence of [union] animus." *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-718 (7th Cir. 1992). General Counsel cannot make a *prima facie* showing required for the unlawful discharge claims. Even if General Counsel did so, the claims would still fail.

The evidence demonstrates that NSL terminated Sullivan, Hirst, and Minyo based on their own misconduct after appropriate investigations. With respect to Minyo and Hirst, the contemporaneous documents prepared by Hayes and Federici corroborate the second and third reporting violation, respectively that resulted in the terminations. With respect to Hirst, it is clear that she committed similar violations in the recent past and was on a final written warning prior to the violation that caused her termination. While Hirst attempts to call into question the validity of her prior disciplinary action, Minyo – the individual who issued it – testified that Hirst's prior disciplinary actions were based on misconduct and had nothing to do with Hirst's Union activities. (Minyo 334-36). Like Hirst, Minyo had a prior failure to report incident. Because Minyo was in management, NSL appropriately held her to a heightened standard.

Finally, NSL terminated Minyo – a non-union management employee – for the exact same incident that resulted in Hirst's termination even though Minyo had fewer instances of past misconduct. Stated simply, NSL treated union-supporting employees like Hirst at least as well as

non-union employees who committed similar (but less frequent) violations. *See Merillat Indus., Inc.*, 307 NLRB 1301, 1303 (1992) (upholding union president's discharge that was consistent with employer's treatment of other employees for similar misconduct).

Similarly, Silvia and Little reported to Belezarian that Sullivan accosted her in the dining room away from her work station. After Silvia and Little reported the incident, Sullivan attempted to coerce Silvia into preparing a false statement. (Silvia 673:9-674:11, 675:1-5, 676:15-17, 680:16-681:7, 686:9-14; Belezarian 2102:13-2102:13-2103:16; Resp. Exh. 15). There is no evidence that NSL sought to terminate Sullivan for her role in the Union. One may disagree with the wisdom of NSL's managerial decisions. But that is not a basis to find a violation of the Act. *See Consol. Biscuit Co.*, 346 NLRB 1175, 1180-81 (2006) (upholding termination to maintain "peaceful relations among employees with differing ethnic origins" even though the employer "did not precisely follow its progressive discipline policy"); *Merrilat Indus* 307 NLRB 1301, 1303 (1992) ("The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it."). The critical and only question is whether anti-Union animus or protected activity was the motivating factor. *See Neptco, Inc.*, 346 NLRB at 21 ("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws.").

To support the termination claims, General Counsel proffered testimony regarding an alleged patient care incident involving Belezarian's son, Christopher Beauregard, to suggest disparate treatment. As an initial matter, NSL notes that the patient care incident at issue was thoroughly investigated and found to lack merit. (*See* O'Kane 1659:1-1660:20). More fundamentally, if Belezarian treated her son more favorably than other employees based on a familial relationship, that would not suggest that NSL violated the Act. On the contrary, it would

suggest that Hirst's termination was based on factors unrelated to the protected activity (*i.e.*, familial relationship to the decision-maker or lack thereof).

The General Counsel also suggests that Belezarian terminated Hirst based on personal animosity, including Hirst's vulgar social media postings stating that Belezarian "dresses like a whore." But this too undermines General Counsel's theory. If Belezarian terminated Hirst because of her vulgarity on social media rather than Section 7 activities, Hirst's claim fails. *See Neptco, Inc.*, 346 NLRB at 21 ("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws.").

The evidentiary record clearly establishes that NSL lawfully terminated Hirst, Minyo, and Sullivan.

G. Nunes' Temporary Transfer Was Lawful

Nunes received a disciplinary write-up and was transferred to another unit within the facility as a result of her harassment and unprofessional conduct towards her coworkers, which created a hostile work environment for numerous employees. Importantly, this was not an "alleged" hostile work environment as the General Counsel suggests – four of her coworkers separately and independently submitted complaints regarding her conduct, reporting that it was so severe that three of them were resigning and another was considering resigning as a result. (Resp. Exhs. 30-33). Given that Nunes was a RN, she was well aware of the importance of complying with NSL's harassment and anti-retaliation polices and codes of conduct, and was likewise cognizant of the consequences of failing to comply with them. Indeed, both the letter of the policies and the NSL's previous enforcement made Nunes acutely aware of what constituted impermissible conduct and what would happen if she engaged in such conduct. (*See* GC Exh. 47). Although discipline as severe as termination was warranted by Country Gardens' policies and

practices and well-supported by the underlying facts, Nunes was still afforded leniency.

There is simply no factual basis to allege that Country Gardens disciplined Nunes for expressing support for the Union or for engaging in activities as a delegate. To the contrary, it appears that Nunes' *own* conduct was driven by an unlawful and retaliatory motive – to subject other employees to hostile attacks and harassment for exercising their Section 7 rights to seek withdrawal of recognition from a union. The General Counsel's allegations are further undermined by the fact that at the time Nunes was disciplined, the Union had been gone from the building for several months. Accordingly, there is no reason to believe Country Gardens would discipline Nunes for purported "union activities," as there was no longer a Union representing Nunes or anyone else at the facility and she was not even engaging in such activities.

Furthermore, accepting the General Counsel's allegations as true would also necessarily require that the statements given by all four of the other nursing staff were completely fabricated. There is no evidence, whatsoever, to support reaching such a baseless conclusion. To the contrary, when comparing the statements of those nurses, it is clear that they were all experiencing the same hostile conduct from Nunes – to an extent so severe they were ready to quit their jobs as a result. (Resp. Exhs. 30-33). The only counter to those consistent and credible statements is the vague allegation that Country Gardens' real motivation to discipline Nunes was her engagement in union-related activities several months earlier. While it is not surprising that Nunes would deny her gross misconduct and unlawful behavior, she does not offer any credible basis to reject four other employees' statements in favor of her own vague and unsupported allegations.

Finally, the actual discipline imposed on Nunes is perhaps the best indication that Country Gardens' actions were not the result of unlawful motivations. Indeed, if it wished to retaliate against her for engaging in union-related activities, it would have simply fired her. But instead,

the Company was lenient, allowing her to keep her job and work on another unit for a short period, thereby giving her a chance to improve her unprofessional behavior. When Nunes completed that transfer period without incident, she was transferred back to her original assignment, further underscoring the lack of any evidence that the Company was motivated by anything other than her own conduct when it disciplined her.

H. NSL Met Its Obligations to Provide Information to the Union

The General Counsel argues that NSL violated Section 8(a)(5) by refusing to provide certain wage data the Union. More specifically, it contends that NSL failed to provide employee wage data beginning on June 12.

But it is undisputed that Belezarian provided the Union with relevant wage data – *i.e.*, the CNA pay rates – at the June 12, 2018 meeting. (*See* GC Exh. 2). Thereafter, various topics were under discussion – Belezarian and Teoli were discussing potential increases to CNA compensation and providing additional requested wage information. That process was cut short not by NSL's unwillingness to provide the information, but on the lawful withdrawal of recognition on July 6, 2018. At that moment, NSL's obligation to produce information terminated. *See Champion Enterprises, Inc.*, 350 NLRB 788, 793 (2007) ("Following a lawful withdrawal of recognition, an employer no longer has a duty to provide a union with requested information.").

Prior to the withdrawal, NSL endeavored to provide relevant information and did so regularly. Thus, the failure to provide information claim fails. *See Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006) ("[T]he only violation that could be found here involves the Respondent's failure to provide the requested information for the 18 days prior to the withdrawal of recognition. Under the circumstances, we do not find that the Respondent's failure to provide the information in the 18 days between the Union's response and the withdrawal of recognition constitutes an

unlawful refusal.").

I. NSL Did Not Engage in Unlawful Surveillance

The General Counsel alleges that NSL violated Section 8(a)(5) by engaging in unlawful surveillance in early July 2018. However, the record clearly shows that any surveillance was based on resident safety needs and was necessary to maintain the highest quality of care.

An employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity. *National Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997). In the context of a residential care facility, the employer's core purpose is to provide patient care, and "a tranquil atmosphere is essential to…carrying out of that function." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495 (1978).

Here, it is undisputed that in early July 2018, the facility was in turmoil due to employee disputes regarding the desirability of continued representation. Employees were frequently congregating in certain areas of the facility during worktime and leaving their work area to discuss representation issues rather than caring for residents. (Belezarian 2139). Multiple employees reported discomfort as a result of these events. (Minyo 324, 352-53, 356-55). NSL had the right to require that during work time in work areas, employees focused on providing the highest standard of care – not congregating in hallways, closets, or other areas of the facility arguing with each other.

Thus, in late June or early July 2018, the facility decided to install a camera system to insure employees were working and caring for residents while they were on the clock. However, the installation could not be completed for several weeks, so in the meantime, NSL installed non-functional "dummy" cameras throughout the facility. (Minyo 350-51, Belezarian 2041). Importantly and intentionally, these cameras were <u>not</u> placed in break rooms or in other areas

where employees may properly discuss work-related issues during non-work time. (Minyo 365-66). NSL did not direct the cameras at any areas that suggested to employees they were being monitored while conducting protected activities. (Belezarian 2140). Given the legitimate basis for installing the non-operable cameras and their absence from certain employee areas (*e.g.*, they were not placed behind the break room door), their presence did not create an unlawful impression of surveillance. *See Lechmere, Inc.*, 295 NLRB 92, 82, 98-99 (1989) (installing security camera did not violate the Act, even though protected concerted activity was recorded, where general security and business purposes justified camera's presence).

In addition to cameras, some witnesses alleged that there was unlawful observation of their activities by management in July 2018. However, it is well-established that an employer's "mere observation of open, public, union activity on or near its property does not constitute unlawful surveillance." *Key Food Stores*, 286 NLRB 1056, 1056-57 (1987) (supervisors' observation of employee "as he solicited signatures for a petition outside the [workplace] … does not constitute unlawful surveillance."). Here, the General Counsel alleges that employees were unlawfully surveilled while they were on the exterior grounds of the facility, and also in resident areas through increased presence of management staff. But the management staff in question were not in earshot of the employees, did not take notes, did not record the Union activities in question, and did not interfere with the Union's activities in any way. *See Days Inn Mgm't Co.*, 306 NLRB 92, 92 n.3 (1992) (no impermissible surveillance where "supervisors did not engage in any photographing of employees, note-taking, or conversations with the union representatives," did not "visibly disrupt any contact with the Union or physically block or impede any employee's access to the union representatives," and were not "able to overhear conversations between employees and union representatives"). There is simply no evidence to establish that management's distant observation

of any activity discouraged employees from speaking to Union representatives.

The General Counsel also suggests that management calling the police regarding Union representatives (non-employees) coming onto the property after the withdrawal of recognition somehow constituted a violation or evidences anti-Union animus. However, this incident also fails to support a Section 8(a)(5) claim. *See Berton Kirshner, Inc.*, 209 NLRB 1081, 1081-82 (1974) (no unlawful surveillance where employer documented trespass by union organizers during handbilling, called police regarding trespass, and did not photograph subsequent handbilling not involving order enforced by trespass); *Roadway Package Sys.*, 302 NLRB 961, 961 (1991) (passive observation of activities openly conducted by union at entrance was not unlawful).

IV. CONCLUSION

NSL lawfully withdrew recognition from the Union based on an unequivocal disclaimer of interest by the bargaining unit employees. None of its conduct leading up to or after that withdrawal of recognition constituted a violation of the Act. Similarly, the three employee terminations at issue were entirely lawful, based on legitimate business and safety reasons and had no connection to any Union-related activities occurring at the facility. For all these reasons, the Board should reject each of General Counsel's baseless claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas J. Posey, caused a copy of the foregoing **NSL COUNTRY GARDENS LLC'S POST-HEARING BRIEF** to be served via email upon the parties listed below on this 23rd day of August, 2019.

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